

**Steven Moser**

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**From:** Steven Moser  
**Sent:** Tuesday, October 19, 2021 3:43 PM  
**To:** Jeffrey H. Ruzal; Matthew Savage Aibel  
**Cc:** Paul Pagano  
**Subject:** Representative Sample

Jeff

Although BBB has not furnished any detail regarding the burden associated with discovery of a representative sample vs. class-wide discovery, we are open to discussing Defendant's proposal for limited pre-certification discovery.

In order to consider BBB's proposal we request the following:

1. A detailed statement from BBB setting forth of the time, cost and burden associated with limited, vs class-wide discovery;
2. The number of Retail Sales Associate Class Members;
3. The number of Retail Sales Associate Class Members in BBB's proposed sample;
4. The number of Retail Stock Associate Class Members;
5. The number of Retail Stock Associate Class Members in BBB's proposed sample;
6. The number of Overnight Department Manager Class Members;
7. The number of Overnight Department Manager Class Members in BBB's proposed sample;

We also anticipate that any agreement to representative sample discovery will include the following:

1. The parties will stipulate in advance as to the scope of discovery for the random samples.
2. BBB will furnish separate class lists in Excel Format for the Retail Sales Associate Class, Retail Stock Associate Class, and Overnight Department Manager class showing names, employee id numbers, dates when employee held the particular job title for BBB which qualifies the individual for membership, store location(s) worked, and dates of employment by a date certain;
3. Plaintiffs will agree not to use the class lists to contact any class member;
4. Plaintiffs will hire a consultant to select random samples (in the number agreed upon between counsel) of the Class List and will furnish BBB with a methodology of how the samples were selected by a date certain;
5. Defendants will furnish separate sample lists by class by a date certain containing the following information in excel format: name, employee id number, dates when employee held the particular job title for BBB which qualifies the individual for membership, store location(s) worked, dates of employment, address and telephone number, by a date certain;
6. Defendants will furnish the agreed-upon discovery for the selected sample by a date certain.
7. BBB will waive any argument that the samples are not statistically significant.
8. BBB will waive any argument that predominance, or commonality cannot be established by the samples.
9. In the event that Defendant is not in possession of or cannot produce weekly payroll data showing for each payment of wages to each class member, "Employee name; Employee number; Employee address; Employee telephone number(s); Job title; Job title code; Workers' compensation classification code; Specific workweek(s) covered by the payment; Work location; The gross wages earned in each workweek covered by the payment of wages, including, regular hours worked, regular rate, regular wages, overtime hours, overtime rate, and overtime wages for each workweek; First day of Pay Period; Last day of Pay Period; Pay Date; Total gross wages; Taxes deducted (including a description and amount of each tax deduction); Other deductions from wages (including a description and amount of each deduction); and Net wages paid

after deductions", BBB will agree that individual and class-wide damages can be determined using the representative samples.

Finally, as a separate matter we are suggesting that a separate ESI protocol be entered into which includes an agreement for (1) a good faith meet and confer between counsel regarding payroll ESI, (2) a follow up meet and confer with respective ESI consultants and Counsel regarding wage and hour ESI in BBB's possession, custody or control and, if the forgoing do not result in a resolution, an (3) an agreement to participate in a joint M&C with an individual from ADP with technical knowledge of what wage and hour information is stored by ADP and how that information can be produced. If there is a cost associated with getting an individual from ADP with technical knowledge to participate, please let us know. *If you agree to the foregoing, we will gladly prepare an ESI agreement.*

Regards,

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